APPEAL NO. 93460

This case returns from a hearing on remand held in (city), Texas, with (hearing officer) presiding as hearing officer. In Texas Workers' Compensation Commission Appeal No. 92656, decided January 22, 1993, we considered the record of the first hearing in this case held in (city), Texas, on November 3, 1992, in which the hearing officer considered the two disputed issues from the benefit review conference (BRC), namely, whether the appellant (claimant) was injured in the course and scope of his employment on or about (date of injury), and whether he timely reported his injury. The hearing officer, at the first hearing, added and considered, with the parties concurrence, issues she regarded as subsumed concerning the correct date of claimant's injury if he was injured, and if he did not timely report his injury, whether claimant had good cause for such failure, or whether his employer had actual knowledge of the injury. We remanded the case to the hearing officer for reconstruction of the record since a portion of the tape-recorded record was unintelligible. At a hearing on remand which opened on March 5, 1993, was continued to May 5, 1993, and which closed on the latter date, the hearing officer admitted a transcription of the unintelligible portion of the record as well as two letters relating to the transcription, and two additional Hearing Officer Exhibits. The hearing officer closed the record on May 5, 1993, and issued a new Decision and Order on that date from which the appellant has appealed. The factual findings and legal conclusions reached by the hearing officer upon remand, which were adverse to the claimant, remain the same as those determined upon the evidence adduced at the first hearing and the claimant requests our review challenging the sufficiency of the evidence to support the adverse conclusions. The respondent (carrier) has responded urging our affirmance.

DECISION

Finding the evidence sufficient to support the challenged legal conclusions, as well as the findings upon which they are based, we affirm.

Claimant testified that his slip and fall injury occurred at about 11:00 a.m. on a day in early December 1991 but not as early as December 1st, that the only days of the week he worked at that time of day were Fridays and Sundays, that he had been quite sure his injury occurred on Sunday, December 8th, until he was told at the BRC that the person who helped him up from the floor did not work that day. He said that on the morning he was injured he was washing dishes in the kitchen of the restaurant where he was employed when he was asked to remove a pot of beans from the stove nearby. As he turned towards the stove he slipped on the wet floor and fell. He said he fell on his side to protect his back since he had previously had back surgery. He stated he fell in the presence of coworkers (Mr. JM) and (Mr. AM) and that he was helped up by (Mr. C), whom claimant understood to have some supervisory responsibility. He stated that Mr. C told him to notify (Mr. E), the supervisor. Claimant said Mr. E was standing in the coffee area of the kitchen at the time and that he walked over to Mr. E and told him he had fallen. Claimant stated he did not feel at the time that he had been injured, continued to work, and did not seek medical treatment. On his

next day off, a Tuesday, which claimant believed to be December 10th, he drove to Mexico with a friend and they visited with the friend's friend, a doctor. He said the doctor suggested he see the surgeon who had performed his back surgery. Claimant said he did not then feel he was injured. Claimant continued to work at the restaurant until January 10, 1992, when he resigned.

In March 1992, claimant contacted the Texas Workers' Compensation Commission (TWCC) and signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on March 20, 1992, which stated the date of injury as (date of injury), a date claimant was admittedly uncertain of, and which stated his lost time commencement date as January 10, 1992, the date he voluntarily resigned his employment. Claimant said he visited his back surgeon, (Dr. W), in June 1992. The single page record of Dr. W introduced by claimant referred to a follow-up evaluation of claimant on June 16, 1992, and the review of an MRI. It contained no history of a fall nor mention of recent trauma, and indicated a "slight uptake at C-7" which claimant said he was told was his "tailbone." The employer's business manager testified that employer's first knowledge of claimant's injury was some time in March 1992 when contacted about his workers' compensation claim. Claimant offered a statement from Mr. C stating he recalled having helped claimant up from the kitchen floor. Mr. JM and Mr.AM testified they were unaware of claimant's having fallen on the kitchen floor as he stated.

The hearing officer found that claimant did not work for his employer on (date of injury), and that on that date he did not fall and injure his back while assisting coworkers in moving a pot of beans in employer's kitchen. She further found that if claimant had fallen and injured his back while assisting a coworker in moving a pot of beans on another date, the only dates this could have occurred were December 1st, 6th or 8th, and that claimant was not injured on those dates because the persons whom claimant said were present at the time were not all working on those dates and claimant himself said it could not have occurred on December 1st. The hearing officer then concluded claimant was not injured in the course and scope of his employment on December 1st, 6th, 8th, or 10th of 1991. The hearing officer further concluded claimant did not timely report his injury, that he did not have good cause for not timely reporting his injury, and that the employer had no actual knowledge of the alleged injury.

We are satisfied that the evidence is sufficient to support the challenged conclusions. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Claimant had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment. Johnson v. Employer Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some

discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could disbelieve a portion of claimant's testimony if she saw fit to do so. Johnson *supra* at 939. As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The essentially illegible and unintelligible employer time sheets claimant attached to his request for review cannot be considered because our review is limited to the record developed at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992; Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992. Claimant offered what appears to be the same exhibit at the hearing on remand on May 5, 1993, and stated he obtained the documents from the employer after the evidentiary hearing of November 3, 1992, but had not previously exchanged the document with the carrier nor requested the hearing officer to consider it before closing the record of that hearing. As the hearing officer pointed out, the hearing on remand was for the purpose of reconstructing a portion of the record, not for the development of additional evidence.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge